

1 UNITED STATES BANKRUPTCY COURT

2 SOUTHERN DISTRICT OF NEW YORK

3 Case No. 18-23538-rdd

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5 In the Matter of:

6
7 SEARS HOLDINGS CORPORATION,

8
9 Debtor.

10 - - - - - x

11
12 United States Bankruptcy Court

13 300 Quarropas Street

14 White Plains, NY 10601

15
16 May 8, 2020

17 11:30 AM

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20
21 B E F O R E :

22 HON ROBERT D. DRAIN

23 U.S. BANKRUPTCY JUDGE

24
25 ECRO: UNKNOWN

1 HEARING re Telephonic Conference (ECF #3539 and #3783)

2

3 HEARING re Letter : Letter Dated May 1, 2020 on behalf of
4 Community Unit School District 300 in Response to Letter
5 from Luke Barefoot, dated April 27, 2020, Requesting
6 Telephonic Status Conference (related document(s)7872)

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25 Transcribed by: Sonya Ledanski Hyde

1 A P P E A R A N C E S :

2

3 CLEARY GOTTlieb STEEN & HAMILTON LLP

4 Attorneys for Transform Holdco

5 One Liberty Plaza

6 New York, NY 10006

7

8 BY: LUKE BAREFOOT (TELEPHONICALLY)

9

10 ROBBINS SCHWARTZ, NICHOLAS, LIFTON & TAYLOR, LTD.

11 Attorneys for School District 300

12 631 E. Boughton Road, Suite 200

13 Bolingbrook, IL 60440

14

15 BY: KENNETH M. FLOREY (TELEPHONICALLY)

16 KATIE ZUMALT-ROGERS (TELEPHONICALLY)

17

18 GENSBURG CALANDRIELLO & KANTER, P.C.

19 Attorneys for School District 300

20 200 West Adams Street, 2425

21 Chicago, IL 60606

22

23 BY: MATTHEW T. GENSBURG (TELEPHONICALLY)

24

25

1 ARCHER & GREINER, P.C.

2 Attorneys for School District 300

3 630 Third Avenue

4 New York, NY 10017

5

6 BY: ALLEN G. KADISH (TELEPHONICALLY)

7

8 VEDDER PRICE P.C.

9 Attorneys for the Village

10 1633 Broadway, 31st Floor

11 New York, NY 10119

12

13 BY: MICHAEL SCHEIN (TELEPHONICALLY)

14

15 LAW OFFICE OF KORY ATKINSON

16 Attorneys for School District 300

17 236 W. Lake Street, Suite 100

18 Bloomingdale, IL 60108

19

20 BY: KORY A. ATKINSON (TELEPHONICALLY)

21

22

23

24

25

1 P R O C E E D I N G S

2 MR. BAREFOOT: Good morning. This is Luke
3 Barefoot from Cleary Gottlieb for Transform Holdco for the
4 11:30 status conference.

5 MR. FLOREY: Good morning. This is Ken Florey and
6 Katie Zumalt, on behalf of Robbins Schwartz, and we
7 represent School District 300.

8 CLERK: Good morning, everyone. My name is Ry.
9 I'm one of Judge Drain's clerks. I understand we have a
10 conference here for 11:30. The Judge just finished his a.m.
11 calendar, so he will be joining us right around 11:30 in
12 just a few short minutes. So please bear with us. In the
13 meantime, I just want to thank everyone for your cooperation
14 (indiscernible).

15 Please be mindful (indiscernible) if you haven't
16 participated via Court Solutions before, please be mindful
17 of your mute buttons. Keep your (indiscernible) on mute
18 when not speaking to avoid any background noise. And please
19 make sure to unmute yourself when you do speak. And each
20 time you do speak, please make sure to state your name so
21 that that way, the Judge, all participants and
22 (indiscernible) the recorder for the transcriber can keep
23 track of who is speaking. Thank you very much once again.
24 And the Judge shall be (indiscernible) shortly.

25 MR. BAREFOOT: Thank you very much.

1 THE COURT: Hello. This is Judge Drain, and we're
2 here in In Re Sears Holding Corp., et al, and more
3 specifically, on a conference prompted by a letter dated
4 April 27, 2020 from counsel to Transform Holdco LLC. Mr.
5 Barefoot requested this conference. I have also reviewed a
6 letter dated May 1, 2020 from counsel for Community Unit
7 School District 300, (indiscernible) the School District, by
8 Mr. Florey, in response to Mr. Barefoot's letter.

9 I don't know if there are any updates from those
10 two letters that I should be told about. Otherwise, we can
11 just proceed with the conference.

12 MR. BAREFOOT: Good morning, Your Honor. This is
13 Luke Barefoot, from Clearly Gottlieb, for Transform Holdco
14 LLC and its affiliates. I do not believe that there are any
15 updates, and the exchange of letters that you just
16 referenced accurately sets out the parties' existing
17 positions.

18 THE COURT: Okay.

19 MR. FLOREY: Good morning, Judge. This is Ken
20 Florey, from Robbins Schwartz, on behalf of School District
21 300. And I agree with Mr. Barefoot that there are no
22 updates to my letter either.

23 THE COURT: Okay. Very well. So I've reviewed
24 the orders. Obviously, there's a lot of history to this
25 underlying matter. But most importantly, there is the

1 amended stipulation and order that I so ordered back on
2 October 23, 2019. I had also separately entered an
3 extension order.

4 But I think the October 2019 stipulation is the
5 key document, and it very clearly states, as I think the
6 parties recognize, that I so ordered a stipulation that
7 stated that, "In the interest of efficiency, until such
8 claims are adjudicated in the Illinois action" -- which we
9 all know what that action is -- "the Court shall defer
10 ruling on the issue of whether the Debtors or any
11 liquidating trust or liquidating trustee may assume, or
12 assume or assign, the EDA agreement, pursuant to Section 365
13 of the Bankruptcy Code, and any disputes involving cure
14 claims associated with the EDA agreement."

15 Notwithstanding that language, Transform seeks in
16 its letter that I, "determine certain threshold bankruptcy
17 issues" raised by the objection to the assumption and
18 assignment of the EDA agreement to Transform. It then lists
19 those three issues, the first being whether the School
20 District's release or waiver of certain liabilities against
21 the Debtors under the amended stipulation and order would
22 constitute a release or waiver of the same liabilities by
23 the School District against Transform, to the extent
24 Transform becomes the Debtors' assignee of the EDA
25 agreement.

1 Two, assuming arguendo that any provisions of the
2 EDA agreement limit Transform's rights to become the
3 developer under the EDA agreement, whether such provisions
4 are unenforceable and the assignment provisions under
5 Section 365(f) of the Bankruptcy Code.

6 And three, to the extent the School District
7 intends to assert this objection, whether the EDA agreement
8 is a financial accommodation under Section 365(c)(2) of the
9 Bankruptcy Code.

10 So, as I understand it, those are the issues that
11 Transform would like me, the bankruptcy Judge, to determine,
12 either before or on a parallel track with the Illinois
13 litigation.

14 Is there anything else that you would like me to
15 interpret, Mr. Barefoot, or just those three issues?

16 MR. BAREFOOT: Thank you, Your Honor. Luke
17 Barefoot, from Cleary Gottlieb. Our request is limited to
18 those three issues.

19 THE COURT: Okay.

20 MR. BAREFOOT: I would be happy to explain the
21 reasons why, notwithstanding the language that the parties
22 negotiated in the stipulation and order, we believe that
23 circumstances have changed and that resolution of these
24 threshold issues on a parallel track -- just to clarify,
25 we're not requesting any sort of a stay or precedence over

1 the Illinois action, but why, particularly given the ongoing
2 delays and the COVID situation that has impacted the
3 Illinois Court's ability to move forward, we believe that
4 parallel resolution of these issues could materially
5 progress the parties' resolution of these issues, and
6 substantially limit, if not moot, any of the issues that the
7 Illinois Court would have to determine.

8 THE COURT: Well, clearly, if I determined that
9 365(f) did not override rights to assign the EDA agreement,
10 separate and apart from the cure issue, or whether I
11 determine that the EDA agreement is a financial
12 accommodation, that would preclude assignment.

13 I don't know whether either of those issues has
14 actually been asserted or is intended to be asserted,
15 though, as part of the objection.

16 MR. BAREFOOT: Your Honor, both of those were
17 asserted in the objection. And just to follow along with
18 Your Honor's logic on points two and three, which would be
19 determinative, issue number one, if Transform is correct in
20 its interpretation of the stipulation and order that this
21 Court retains jurisdiction over, that would take off of the
22 table all of the cure cost claims from 2017 and prior, and
23 avoid the need for nitty-gritty discovery and thorny issues
24 of state law on employment numbers going back half a decade.

25 THE COURT: Okay. Let's leave aside number one

1 for the moment. On two and three, are these points that the
2 School District intends to pursue?

3 MR. GENSBURG: Good morning, Your Honor. Matt
4 Gensburg, on behalf of the School District. Both of those
5 points have been raised in the objections to assumption and
6 assignment, along with others.

7 THE COURT: Okay. So I guess that's a yes.

8 MR. GENSBURG: That is a yes, Your Honor.

9 THE COURT: I'm not asking you to waive them. I
10 just wanted to know, because their couched in somewhat
11 uncertain -- you know, to the extent that, assuming arguendo
12 that -- so it wasn't clear to me whether this is still a
13 live issue.

14 It would appear to me that those two issues are
15 gatekeeping issues, and they're not really the issues that
16 the Illinois action was intended to deal with. They're not
17 teed up in the Illinois action at all. So to me, I suppose
18 those -- I mean, both sides --

19 MR. GENSBURG: Judge --

20 THE COURT: -- both sides could avoid extensive
21 time and expense if I ruled on those two issues in the
22 School District's favor, for example.

23 MR. GENSBURG: Judge, again, Matt Gensburg. I
24 understand the logic of the Court. But let me explain to
25 the Court where the School District is coming from.

1 One of the fundamental components that the School
2 District has been trying to deal with is trying to avoid the
3 cost and expense of duplicative litigation. And the School
4 District --

5 THE COURT: Well, this is not duplicative. How is
6 this duplicative, these two issues?

7 MR. GENSBURG: Well, for example, the issue of
8 whether the Sears or Transform Holdco, or whoever tries to
9 take over this agreement, complies with the terms of the
10 agreement, is going to drive largely whether they assume,
11 elect to assume, or reject the agreement.

12 If the State Court rules in our favor, as we
13 anticipate it will, that there's a certain minimum full-time
14 job equivalent requirement that exists, that Sears has not
15 met that, is not meeting it, there's a strong possibility
16 that Transform Holdco's not going want to even assume this
17 agreement, because the economic benefit of this agreement
18 simply doesn't exist anymore. And in that situation,
19 there's no need to deal with the 365(c)(1) issue or the
20 365(c)(2) issue.

21 THE COURT: Now, are those issues issues that
22 involved any facts, any discovery, or can they be dealt with
23 on review of the contract and applicable law?

24 MR. GENSBURG: It's going to involve review of the
25 underlying statute, for example, with respect to 365(c)(1),

1 the anti-assignment language. It's going to deal with the
2 financial combination, understanding the nature and extent
3 of the contract and agreement between the parties with the
4 legislation the EDA agreement contemplated in terms of the
5 tax rebates, and the financial accommodations associated
6 therewith, what the intent of the legislature was in both
7 scenarios.

8 THE COURT: So --

9 MR. BAREFOOT: Your Honor, Luke Barefoot, from
10 Cleary Gottlieb. From our perspective, neither of these
11 issues require any discovery. I don't disagree with the
12 School District counsel's position that these would require
13 examination of the legislation and the impact of that under
14 365(f) and 365(c)(2), in terms of looking at the agreement.
15 But I don't think any of those require factual discovery
16 between the parties.

17 THE COURT: Well, the only person, or the only
18 side, that is really materially advanced by my determination
19 of these two issues, I would think would be this School
20 District, right? Because if Transform wins on both of these
21 issues, it still has the other issues to deal with. And I
22 would think I could deal with these two issues rather
23 quickly.

24 But if the School District doesn't want to have
25 that answer right away, I'm not sure why -- you know, that's

1 just another, you know, maybe a month after you get the
2 answer on the cure amount.

3 MR. BAREFOOT: Your Honor, this is Luke Barefoot.
4 Just to respond to that point, if these issues are decided
5 in the School District's favor, it would eliminate the
6 possibility for Transform to reasonably have this agreement
7 and continue to pursue having this agreement assumed and
8 assigned.

9 So from Transform's perspective, and keeping in
10 mind that under the assumption and assignment procedures
11 order, Transform has the ability at any time to withdraw its
12 designation of assumption and assignment, up until a final
13 order is entered by this Court. We're trying to avoid a lot
14 of potentially thorny and extensive litigation in Illinois,
15 if that litigation is all for naught because of special
16 bankruptcy issues that render that litigation irrelevant.

17 THE COURT: Okay.

18 MR. GENSBURG: Your Honor, Matt Gensburg. But the
19 fundamental problem here is this, is that in the stipulation
20 and order, this is exactly what Paragraph 7 intends to
21 avoid. The School District gave its counsel, Ken Florey,
22 Kory Atkinson and myself, Allen Kadish, directions when we
23 were negotiating the stipulation and order, that one of the
24 things they wanted was to prioritize the litigation, and
25 that the litigation would not take place in two forums

1 simultaneously. That the litigation would take place in
2 Illinois, and only thereafter, if it was still relevant,
3 that the issues of assumption and assignment would we come
4 back to the Bankruptcy Court.

5 And the language in the stipulation and order,
6 which was a product of substantial negotiation and give and
7 take is abundantly clear on this point. You know, we gave
8 up our right and claim to 2017 EDA funds. We gave up
9 certain claims against the bankruptcy estate. We withdrew
10 with prejudice our objections to the plan confirmation,
11 withdrew with prejudice our ballots, and in return, Sears,
12 you know, forgave its interest in the 2018 EDA funds. And
13 in return, it was agreed that the Court would defer ruling
14 on the assumption and assignment issues under 365.

15 THE COURT: Okay.

16 MR. GENSBURG: And --

17 THE COURT: Well, I understand all of that. And I
18 also understand that ultimately, this is a -- if this were
19 pressed, this would be a motion under Rule 60, which is hard
20 to win. I get all of that.

21 Let me turn to the first point. This just depends
22 on the wording of the stipulation, right? Whether the
23 School District's release or waiver of certain liabilities
24 against the Debtors under the amended stipulation and order
25 would constitute a release or waiver of the same liabilities

1 by the School District against Transform?

2 MR. GENSBURG: It does, Your Honor.

3 THE COURT: All right. So, to me -- look, I
4 appreciate I signed this, but there is no... To me, this is
5 the parties' stipulation, which I so ordered. It's really a
6 contract. I don't see why if Transform wants to rely on
7 this language in this stipulation, it can't, in the Illinois
8 action, make a motion for judgment on the pleadings or for
9 partial summary judgment on this issue.

10 MR. BAREFOOT: Your Honor, Luke Barefoot from
11 Cleary --

12 THE COURT: Hold on.

13 MR. BAREFOOT: If I could just respond to that
14 point, please?

15 THE COURT: Okay.

16 MR. BAREFOOT: I think the issue with that, with
17 our potentially moving and having the Illinois Court
18 interpret the stipulation and order is that this Court
19 retained jurisdiction over the implementation,
20 interpretation and enforcement of that order. So it's not
21 clear to us that the Illinois Court is the correct forum for
22 that issue. And obviously, the other two --

23 THE COURT: Well, it's not exclusive jurisdiction.
24 I mean, I don't -- it's just an agreement.

25 MR. BAREFOOT: Understood, Your Honor. I think

1 just carrying on with that, the other two issues are core
2 bankruptcy issues that I don't think it's anyone's
3 contemplation would ever be brought before the Illinois
4 Court, or could make --

5 THE COURT: No, those two aren't. No, I'm just
6 talking about number one. The other two --

7 MR. BAREFOOT: Understood.

8 THE COURT: The other two, based on my reading of
9 the stipulation, which covered -- it referred to the
10 objection to the (indiscernible) assignment were to be
11 deferred, not that the School District would be dealing with
12 those in the Illinois action.

13 MR. BAREFOOT: Your Honor --

14 THE COURT: But this one, as far as the amount
15 owing, I don't understand why it isn't a defense that the
16 amount isn't owing, because it was raised in a stipulation
17 and order. Now, I understand that the School District will
18 point to other provisions of the order, the stipulation and
19 order, that say it's not waived. But I don't -- this one --
20 I'm not offended by the Illinois Court dealing with this.
21 And it doesn't need any discovery to deal with it. It can
22 just interpret the language.

23 MR. SCHEIN: Your Honor, if I may, this is Michael
24 Schein, Vedder Price, on behalf of the Village. A couple of
25 things for Your Honor that we wanted to clarify. As it

1 relates to this stipulation and order, it was very clear,
2 these negotiations that went on were between the Debtors and
3 the School District. And as the stipulation especially
4 shows, the Village was not bound by Paragraph 7 at the
5 District sites; that the only thing the Village was a part
6 of -- and it is important for the Village here, because the
7 EDA is (sound drops) the EDA subsumes the Village -- is that
8 we only became a part of this stipulation for purposes of
9 making the distributions, since we were holding the money
10 for which the Debtors and the School District were settling
11 and compromising claims, rights and otherwise. So we don't
12 believe Paragraph 7 binds on us from the purpose of how the
13 EDA is handled.

14 Secondly, Your Honor, I think it's important for
15 the Court to understand what's actually going on in the
16 Illinois litigation, because as Your Honor remembers, when
17 you first entered that abstention order, that was when the
18 School District told the Court that they could be back and
19 be done at the State Court in 60 days. We're clearly hardly
20 60 days, putting aside the impact of the pandemic.

21 And I think what is important for the Court to
22 understand is we are still very far behind on complaints.
23 There have been only two -- there have been four amended
24 complaints filed by the District, Your Honor, over time, all
25 of which were required by the State Court motions for leave

1 to file. And all of the amendments have not been caused by
2 any delay of any of the other parties but the School
3 District, who has been required, among other things, to add
4 necessary parties, and who have actually changed that
5 original complaint from a declaratory relief to actually
6 claims specifically against the Village for damages and
7 otherwise.

8 So the litigation in the State Court has very much
9 changed from where it started. And we believe that these
10 issues raised by Transform's counsel can very cleanly be
11 handled here, especially in light of the fact, Your Honor,
12 as you may know, that the Circuit Court has further delayed
13 even a hearing on leave for the District to file its fourth
14 amended complaint. And that hearing, which was currently
15 scheduled for May 26, has been delayed for another 30 days
16 for a date for which we are still waiting from the State
17 Court judge.

18 So those delays impact all the parties, including
19 the Village, as well as Transform and others. And we
20 believe that Transform's efforts to move this in parallel
21 track is an efficient way for all the parties to handle
22 these discrete issues.

23 MR. FLOREY: Judge, this is Ken Florey.

24 THE COURT: It may be efficient, but I go back to
25 the language in the order. I mean, it was the School

1 District that filed an objection to assumption an
2 assignment, right?

3 MR. SCHEIN: Correct.

4 THE COURT: Okay. So --

5 MR. SCHEIN: But those issues sit before Your
6 Honor as part of a cure objection and can be handled before
7 Your Honor. And again, the deal for the order of the
8 litigation was an agreement between the Debtors and the
9 School District. It was not --

10 THE COURT: I'm sorry --

11 MR. SCHEIN: -- a binding agreement.

12 THE COURT: I was just -- that's why I began this
13 call way I did. I was told by the School District that this
14 objection to the assumption and assignment includes or
15 implicates issues under 365(f) and 365(c)(2). Right?

16 MAN: And (c)(1), Judge.

17 THE COURT: Well, okay. But I'm saying that the
18 objection isn't just a cure objection. It covers the whole
19 thing.

20 MR. BAREFOOT: Your Honor, this is Luke Barefoot.
21 If I could briefly address Your Honor's point concerning the
22 procedural posture, that this amounts to a revisiting of the
23 stipulation and order. We understand and accept that
24 perspective.

25 But I think it's important to keep in mind that

1 the stipulation really is in the nature of a consent decree.
2 It's the agreement of the parties, rather than some course
3 of law or ruling of the Court that creates all of the
4 obligations in the stipulation and order. And under Rule
5 60(b)(5), there has been a fundamental change in
6 circumstances between now and October in terms of our
7 expectations on the length of time that it would take to
8 make progress on the issues that were teed up in the
9 Illinois action, as well as the nature of those issues.

10 There have been four amended complaints since that
11 time, which we wouldn't have anticipated, all of which have
12 delayed the progress of that litigation and changed the
13 nature of the relief that's been sought. And there's also
14 obviously been the impact of the pandemic, which none of us
15 could have predicted, that has left further ambiguity about
16 when the State Court action will ever even progress again.

17 So I do understand and accept Your Honor's
18 observations and the School District's position. But I
19 believe that under 60(b)(5), we have made out a case for an
20 amendment based on the fact that an enforcement of what the
21 parties had memorialized at that time would no longer be
22 equitable.

23 MR. FLOREY: Judge, this is Ken Florey, on behalf
24 of School District 300. Both counsels are being
25 disingenuous in describing their part in the delay in the

1 Illinois case. We have detailed in our letter, and I'm not
2 going to go into it anymore, but I'm not just going to sit
3 here quiet and listen to their claims that the slowdown in
4 the Illinois case has nothing to do with either of those two
5 parties' strategy in litigating the case, as well as you
6 pointed out they could simply file a motion for partial
7 summary judgment on the first issue that they brought before
8 this Court and get a determination by the State Court.

9 THE COURT: I don't really have an answer yet on
10 that point, Mr. Barefoot.

11 MR. BAREFOOT: I do have an answer, Your Honor.
12 First off, I don't want to belabor the Court with a he-
13 said/she-said on the play-by-play in the State Court
14 litigation. But two relevant observations.

15 First, you know, Transform has met every deadline
16 imposed by the Court in Illinois. Transform answered the
17 amended complaint. It's only been since then that there
18 have been a second, a third, and a fourth amended complaint,
19 that the Court in Illinois has required a ruling on the
20 leave to amend in order to have those progressed.

21 I also wanted to note that the School District
22 suggests that the Circuit Court requested that the parties
23 agree on discovery. What actually happened was that the
24 Circuit Court merely observed that the parties could engage
25 in discovery, and both Transform and the Village have not

1 agreed to proceed with discovery until we have an operative
2 complaint before us.

3 I also just want to just reiterate that I think we
4 all would agree that this action may have progressed, and we
5 might have an operative complaint, and might have an
6 opportunity to raise a motion for judgment on the pleadings
7 or a motion to dismiss to tee up the first issue. But we
8 didn't have that opportunity because we don't have an
9 operative complaint before us or a schedule for responding
10 to that complaint.

11 THE COURT: Okay. Well, I'm not going to undo the
12 order at this point. If there is a further delay into July
13 of the filing of, as you phrased it, an operative complaint,
14 then you can renew your request. But it seems to me that
15 the core cure issue can be addressed, as point one states,
16 it could be addressed at least, by either Court, and might
17 as well have it be consistent with the -- what was
18 contemplated by the stipulation and order, which is that
19 those underlying cure issues, which include waiver, be
20 decided by the Illinois Court.

21 As far as the other two points are concerned, I
22 can see a basis for efficiency here. But on the other hand,
23 I don't think it's enough to overcome the sanctity of the
24 stipulation and order, which can be overcome under
25 appropriate circumstances, but I don't just see it here.

1 And as far as the various amended complaints are
2 concerned, it strikes me that if this issue had been teed up
3 before me, those same issues might have arisen, involving
4 other parties than who were before me at the time, at which,
5 reading between the lines, is why there were that many
6 amended complaints.

7 So this is just a conference. It's on the record
8 and you can get a transcript from the Clerk's office, or
9 make a request from the Clerk's office. But it's not with
10 regard to a motion. But I'm giving you a pretty clear
11 signal that if you made a motion for relief under Rule 60, I
12 wouldn't grant it under these facts. Now, they may change.
13 It may be that there is still a major problem with the
14 complaint, or the Illinois Court just is sitting on it. I'm
15 sure they're dealing with reopening issues, just as our
16 courts are.

17 And that's another issue for both of you. I am
18 incredibly busy right now. This will be my second 12-hour
19 day of court time. And your likelihood of getting a hearing
20 on any of these three matters probably would be in August at
21 the earliest.

22 So I think you will get a prompt answer on points
23 two and three, if and when it's warranted. But you're just
24 as likely to get a prompt answer on one from the Illinois
25 Court as from me. And under the stipulation, it should be

1 from the Illinois Court, unless something dramatically
2 changes.

3 So I'm going to ring off now. I have to prepare
4 for my 2:00 hearing and read a disclosure statement that
5 just came in last night that's about 200 pages long. So
6 I'll talk to you then. Goodbye.

7 All: Thank you, Judge.

8 (Whereupon these proceedings were concluded at
9 12:10 PM)

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C E R T I F I C A T I O N

I, Sonya Ledanski Hyde, certified that the foregoing
transcript is a true and accurate record of the proceedings.

Sonya

Ledanski Hyde

Digitally signed by Sonya Ledanski
Hyde

DN: cn=Sonya Ledanski Hyde, o, ou,
email=digital@veritext.com, c=US

Date: 2021.07.08 14:57:03 -04'00'

Sonya Ledanski Hyde

Veritext Legal Solutions

330 Old Country Road

Suite 300

Mineola, NY 11501

Date: May 13, 2020

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